

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

G4S REGULATED SECURITY
SOLUTIONS, A DIVISION OF
G4S SECURE SOLUTIONS (USA) INC.
f/k/a THE WACKENHUT CORPORATION

and

Cases 12-CA-26644
12-CA-26811

THOMAS FRAZIER, an Individual

and

CECIL MACK, an Individual

**ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S
DECISION AND RECOMMENDED ORDER**

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A. Statement of the Case

These cases¹ involve alleged violations of Section 8(a)(1) of the National Labor Relations Act (the Act) by G4S Regulated Security Solutions, a Division of G4S Secure Solutions (USA) Inc., f/k/a The Wackenhut Corporation (Respondent). Specifically, the Complaint alleges that Respondent suspended and discharged long term employees Thomas Frazier and Cecil Mack in retaliation for their protected concerted complaints regarding the wages, hours, and working conditions of Respondent's employees.

The ALJ recommended dismissal of the Complaint based on his conclusion that Frazier and Mack were employed as supervisors within the meaning of Section 2(11) of the Act. The ALJ failed to address the issue as to whether Respondent suspended and discharged Frazier and Mack because of their protected concerted activities.

B. Issues Presented

1. Whether the ALJ erred by failing to conclude that at all times material herein, Thomas Frazier and Cecil Mack, who were employed as lieutenants at the time of their suspensions and discharges, were employees as defined in Section 2(3) of the Act. (Exceptions 1, 2, 3, and 4)

¹ The charge in Case 12-CA-26644 was filed on February 22, 2010, by Thomas Frazier, an individual, against Respondent. The charge in Case 12-CA-26811 was filed on July 29, 2010, by Cecil Mack, an individual, against Respondent. An Order Consolidating Cases, Consolidated Complaint (the Complaint) issued on December 29, 2010, against Respondent and was amended on March 21, 2011. The hearing in these matters was held before Administrative Law Judge William N. Cates (the ALJ) on April 4, 5, and 6, 2011 in Miami, Florida. The ALJ issued his Decision on June 27, 2011.

2. Whether the ALJ erred by concluding that at all times material herein, Thomas Frazier and Cecil Mack were supervisors as defined in Section 2(11) of the Act. (Exceptions 1, 2, 3, and 4)
3. Whether the ALJ erred by failing to rely on the testimony by Cecil Mack regarding the duties and authority of lieutenants at the Turkey Point facility. (Exceptions 7, 9, and 11)
4. Whether the ALJ erred by failing to follow the Board's decision in *Wackenhut Corp.*, 345 NLRB 850 (2005), and by relying on evidence of disciplines and disciplinary authority to find that Thomas Frazier and Cecil Mack were statutory supervisors, even though that evidence was essentially identical to evidence that the Board considered and found to be insufficient to establish the supervisory status of lieutenants in the earlier case. (Exceptions 6 and 7)
5. Whether the ALJ erred by concluding that there is evidence to establish that lieutenants are statutory supervisors based on their involvement in discipline short of discharge issued without the necessity of consulting with or obtaining approval from higher managers. (Exceptions 8 and 9)
6. Whether the ALJ erred by failing to find that there is no evidence of a direct link between lieutenant performance evaluations of security officers and promotions or other changes in terms of employment. (Exception 10)
7. Whether the ALJ erred by concluding that the role of lieutenants, including Thomas Frazier and Cecil Mack, in performing evaluations of security officers which might impact promotions of security officers or promotional opportunities, establishes supervisory authority. (Exceptions 10 and 11)

8. Whether the ALJ erred by failing to consider unrefuted evidence that bargaining unit security officers evaluated lieutenants, including Frazier and Mack. (Exception 12)
9. Whether the ALJ erred by concluding that lieutenants exercise independent judgment in transferring security officers from one post assignment to another. (Exception 13)
10. Whether the ALJ erred by concluding that lieutenants have the authority to responsibly direct the work of security officers. (Exception 14)
11. Whether the ALJ erred by relying on evidence of lieutenant pay, benefits, training, required attendance at management meetings, and the number of security officers assigned to each captain, in the absence of evidence of actual statutory supervisory authority. (Exception 15)
12. Whether the ALJ erred by relying on the general, conclusionary, and self-serving testimony of Project Manager Michael Mareth regarding the duties and authority of lieutenants at the Turkey Point facility. (Exception 16)
13. Whether the ALJ erred by failing to make findings and conclusions based on the record evidence which establishes that Respondent indefinitely suspended and discharged Thomas Frazier and Cecil Mack because they engaged in protected concerted activity and to discourage employees from engaging in these or other concerted activities, in violation of Section 8(a)(1). (Exceptions 17 and 18)
14. Whether the ALJ erred by failing to conclude that Respondent is liable, as part of the remedy for its unfair labor practices, for reimbursing Thomas Frazier

and Cecil Mack for any excess federal income taxes owed upon receiving a lump sum backpay award covering more than one year of backpay. See *WEBCO Industries, Inc.*, 340 NLRB 10 (2003). (Exception 19)

15. Whether the ALJ erred by failing to conclude that Respondent, as part of the remedy for its unfair labor practices, must notify the Social Security Administration as to the appropriate periods in which to allocate backpay as set forth in the Internal Revenue Service Publication 957 – Reporting Back Pay and Special Wage Payments to the Social Security Administration. (Exception 20)

16. Whether the ALJ erred by failing to provide for all other relief that is just and proper to remedy the unfair labor practices. (Exception 21)

C. Argument

1. Thomas Frazier and Cecil Mack were employed in the lieutenant position and performed job duties which the Board has previously determined were not supervisory duties. (Exceptions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15)

a) Relevant Board Decisions Involving Respondent's Employees (Exception 6):

In analyzing the employee status of lieutenants Thomas Frazier and Cecil Mack, the ALJ failed to consider and follow Board precedent on this issue. Prior to September 1, 2003, Respondent's security guard force at the Turkey Point plant consisted of captains, lieutenants, sergeants, and security officers. On July 8, 1999, the International Union Security, Police and Fire Professionals of America, Local 610 (the Union) was certified to represent the following unit: All full-time and regular part-time security officers, watchpersons, and central alarm system (CAS) operators and secondary alarm system (SAS) operators performing guard duties at Turkey Point. In a subsequent Board representation

case, the Union petitioned to represent sergeants employed at the Turkey Point plant. Respondent vigorously challenged that petition and asserted that the sergeants were supervisors under the Act because they responsibly directed and assigned work to security officers. On January 10, 2003, the Regional Director issued a Decision and Direction of Election finding that Respondent's sergeants were employees rather than supervisors based on a record which included documentary evidence and testimony similar to that which was received in the instant matter, such as post assignment sheets, annual performance evaluations, and Security Force Instructions (SFI's). (GCX 3)² Despite Respondent's argument that the SFI's do not always fully address each situation and require sergeants to utilize independent judgment and discretion to respond accurately, the Regional Director determined that sergeants did not meaningfully direct and assign work inasmuch as the post assignments were limited by the SFI's and could not be modified without obtaining the captain's permission. (GCX 3)

The above described issues raised at the representation proceeding pertaining to the sergeant classification were reviewed by the Board and, on February 12, 2003, the Board denied Respondent's Request for Review. (GCX 3) Thereafter, on March 4, 2003, the Union was certified to represent a second unit consisting of all sergeants employed at Turkey Point. (GCX 3)

In spite of the above determinations, on September 1, 2003, Respondent proceeded to eliminate the sergeant position and remove the CAS/SAS operators from the certified bargaining unit of security officers.

² As used herein "Tr." Refers to the official transcript, "GCX" refers to General Counsel's exhibits, "RX" refers to Respondent's exhibits, and "ALJD" refers to the ALJ's Decision.

Contemporaneous with these unlawful acts, Respondent reassigned several sergeants and security officers who performed CAS and SAS duties (including Thomas Frazier and Cecil Mack) to lieutenant positions where they continued to perform their respective duties. (Tr. 159:13-14 Frazier; Tr. 272:11-12 Mack). There is no dispute that as of September 1, 2003, lieutenants at the Turkey Point plant commenced to perform the same job duties previously performed by sergeants and CAS/SAS operators. Because Respondent's actions on September 1, 2003, were a clear attempt to circumvent the Board's previous unit determinations and the subsequent bargaining obligation which resulted from the Union's success in the sergeant election, the Union filed unfair labor practice charges. Respondent's contention at the trial in that matter was that lieutenants were statutory supervisors based on evidence of authority to direct work and discipline the security officers.³ In *Wackenhut Corp.*, 345 NLRB 850 (2005), the Board ruled that Respondent unilaterally eliminated the sergeant position, removed the CAS/SAS operators from the bargaining unit, and reassigned the work performed by sergeants and CAS/SAS operators to non-unit lieutenants in violation of Section 8(a)(1) and (5) of the Act. The Board further concluded that the evidence did not establish that the new CAS/SAS operating lieutenants were statutory supervisors. 345 NLRB 855.

Although the ALJ took official notice of the Decision and Direction and Election, the Board's Order denying Respondent's Request for Review, and the Certification of the Union for a bargaining unit comprised of sergeants, he erred

³ In *Wackenhut Corp.*, 345 NLRB 850, 854 (2005), Respondent did not contend that the lieutenants had authority to hire, transfer, suspend, lay off, recall, promote, discharge, or reward employees or effectively recommend such actions.

by disregarding the fact that there has been no material change between then and now with respect to the duties of the affected lieutenants, although the Respondent has continued to argue that they are statutory supervisors despite the Board's conclusion to the contrary. (Tr. 244:9-11; 245:21:23). Nor did the ALJ rely upon newer case law with respect to the specific purported supervisory indicia upon which he relies, although he generally relied upon *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006).

b) Respondent's Burden to Establish Supervisory Status (Exceptions 10, 11, 12):

The ALJ properly acknowledged that Section 2(11) of the Act defines the term "supervisor" to include any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. As the ALJ stated, under Board and Supreme Court precedent, the possession of any one of the indicia specified in Section 2(11) is sufficient to confer supervisory status on an employee, provided that the authority is exercised with independent judgment on behalf of management and not in a routine manner. (ALJD 12:14-29). *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) citing *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). The ALJ also correctly acknowledged that the party asserting supervisory status has the burden of proof on that issue, and that the Board does not construe supervisory status too

broadly “because the employee who is deemed a supervisor is denied the rights which the Act is intended to protect.” (ALJD 12:18-35). *Oakwood Healthcare, supra*, citing *Chevron Shipping Co.*, 317 NLRB 379, 380-381 (1995).

However, the ALJ erroneously concluded that Thomas Frazier and Cecil Mack are not subject to the Act’s protection because they engaged in certain duties that the ALJ concluded demonstrate their supervisory status. In reaching this decision, the ALJ disregarded the Board’s *Wackenhut* precedent involving the same group of employees, overlooked evidence which demonstrates that no material change of duties occurred since the Board’s first decision, and relied upon documentation lacking sufficient probative value, and general, self-serving and conclusionary testimony from Respondent’s officials.

c) Performance Evaluations Do Not Establish Frazier’s or Mack’s Supervisory Authority (Exceptions 10, 11, 12):

Performance evaluations signed by the issuing lieutenant were not discussed in the prior Board decision but had been considered in the representation case that was part of that record. Prior to September 1, 2003, sergeants and lieutenants met and discussed the performance of security officers on their respective teams and upon reaching a consensus, a recommendation was submitted to the captain who would give strong consideration to their opinions when delivering a final evaluation. (GCX 3). There is no dispute that in around 2008, lieutenants began to review the performance evaluations with security officers prior to submitting them to the captain. (Tr. 205:11-15; 206:25-207:12 Frazier). The ALJ concluded that, “the lieutenants are supervisors under Section 2(11) of the Act based on the fact they prepare evaluations of the

security officers that, in part, are considered in determining whether the security officers are promoted.” (ALJD 13:43-45). However, as was the case in the prior representation case for sergeants, there is no proof to establish that the lieutenant evaluations of security officers are directly linked to promotions, or are directly linked to other aspects of security officers’ employment status or tenure.

The Promotion Policy and Procedure received in evidence shows that Respondent’s promotion process has numerous stages and involves many opportunities for the exercise of discretion by higher managers who constitute Respondent’s promotion board.⁴ (RX 17) The promotion process begins with the selection of finalists based on points earned on a written examination (RX 17 Section 4.11) and an oral interview before the promotion board. (RX 17 Section 4.12) Following selections, the promotion board members review documents contained in the personnel files for each finalist to determine technical and leadership skills, performance record, and overall qualifications. (RX 17 Sections 4.13 and 4.14). The documents reviewed include not only performance appraisals (evaluations), but also documents concerning attendance, achievements, disciplinary actions, and educational background. Section 4.15 of Respondent’s Promotion Policy and Procedure provides that: “From this compiled information, the board will then select the best-qualified individual(s) for promotion.” The promotion board narrows the selection of individual(s) for promotion and submits a recommendation to the Project Manager for

⁴ Under Section 4.9.2, the members of the promotion board include the Assistant Project Manager or Operations Supervisor, Security Shift Supervisor, and Training Coordinator or other supervisor designated by the Project Manager. There are no lieutenants on the promotion board. (RX 17 at page 3)

concurrence, who retains authority for the final approval of promotions. (RX 17 Sections 4.16 and 4.17).

Contrary to the ALJ's conclusion, the impact of the lieutenant evaluations, if any, is not established by the record evidence. Clearly, the Respondent's Promotion Policy and Procedure is a process which involves multiple phases and layers of review by members of the promotion board, who exercise their discretion with regard to the promotion of candidates based on information gathered from various sources before making a recommendation to the Project Manager. The ALJ marginalized the entire promotion process by identifying only one small aspect of the review, the performance appraisals. He overlooked specific language in the promotion policy which describes the review of additional documents pertaining to attendance, achievements, disciplinary actions, and educational background to determine if a promotion is warranted, and the independent review and discretion exercised by higher managers on the promotion board, and by the Project Manager. (ALJD 14:10).

There is no probative record evidence upon which to conclude that performance appraisals or evaluations by lieutenants are a determining factor or played a specific role in promotions in any particular case. Such proof linking the evaluations to an employment action is required. For example, in *Bayou Manor Health Center*, 311 NLRB 955 (1993), specific documentary evidence was produced to establish a correlation between scores awarded by the LPN reviewers and merit increases or bonuses awarded to the CNAs under review. In this case, the ALJ wholly accepted general, conclusionary testimony from Project

Manager Michael Mareth on the issue concerning lieutenant evaluations and promotions of security officers stating that, "Mareth even recalled four security officers whose recent promotions were 'impacted' by their lieutenant's evaluations and that there were perhaps eight other like situations where security officers' promotions were impacted by their lieutenant's evaluations in the previous year to year and half." (ALJD 14:15-18). However, Mareth merely testified that evaluations by lieutenants "were considered" in connection with those promotions of security officers, and provided no details. (Tr. 330:5 Mareth). Thus, there is no evidence about the impact of the evaluations on Respondent's promotion decisions. Reliance on such general testimony without the accompanying documentary proof or specifics is misplaced, particularly in a case where a contrary finding was previously made on the same supervisory issue. Section 5.1 of Respondent's Promotion Policy and Procedure provides that Project Manager Mareth must indefinitely retain documents relating to job postings, resumes or letters of interest, original tests, answer sheets, and promotion board scores and tabulation sheets. (RX 17). Inasmuch as no such evidence was produced by Respondent, it should be inferred that such evidence would fail to establish a significant link between the evaluations and promotions.

The ALJ erred by failing to rely on the testimony of lieutenant Cecil Mack, which he did not discredit. Mack testified that he evaluated six security officers during his employment and was told by management that the exclusive purpose of evaluations was to set goals for the security officers. (Tr. 295:10, 19 Mack). Mack further testified that these evaluations were discussed with the shift captain

and attendance issues were the main topics discussed. Mack credibly testified that he is not aware of any action taken for or against a security officer as a result of any evaluation that he prepared. (Tr. 296:12-17 Mack). Notably, the ALJ avoided discussion of Mack's testimony which weakens any possibility of a link between evaluations and promotions and the ALJ did not indicate any basis to discredit Mack's testimony. Mack's testimony supports the conclusion that reliance on the performance evaluations to establish supervisory authority is misplaced. In view of the above, the finding that the lieutenant evaluations have a direct linkage to promotions is erroneous and should be reversed.

The ALJ also failed to consider unrefuted evidence that security officers evaluated lieutenants by completing a form called the 360-Degree Leadership Feedback Tool (360 Tool). Leadership Development Manager, Karen MacDonald, testified that the 360 Tool was used to assess the performance of lieutenants, and served as part of the promotion process for lieutenants and to provide feedback to Respondent from security officers. (Tr. 148:1-3, 12 MacDonald). In fact, Respondent relied on certain information from the 360 Tool forms submitted for Thomas Frazier and Cecil Mack in deciding their fate in connection with their continued employment. Respondent referred to the 360 Tool forms for Frazier prior to concluding that Frazier failed his leadership effectiveness review and discharging him. (GCX 6 and 7; Tr. 46:1-11; 47:3-11 Mareth). Similarly, Respondent reviewed the 360 Tool forms for Mack before reaching a decision to discharge him in spite of the positive ratings from security officers. (GCX 13). The ALJ failed to address Respondent's solicitation of the

360 Tool forms from security officers. Clearly, evaluations performed by bargaining unit security officers seriously undercut any converse argument that the lieutenant evaluations of security officers should be deemed a factor to establish supervisory status under the Act.

Based on the above, Respondent has not met its burden to establish that the lieutenant evaluations are directly linked to promotions or otherwise affect the employment status of security officers, and the ALJ's findings and conclusion should be reversed.

d) The Role of Lieutenants in Discipline Does Not Establish Their Supervisory Authority (Exceptions 6, 7, 8, 9, 16):

In *Wackenhut Corp.*, 345 NLRB 850 (2005), the Board considered Respondent's contention that lieutenants were statutory supervisors based on authority to direct and discipline security officers. The Board determined that Respondent failed to meet its burden to show that the lieutenants exercised supervisory authority because it: 1) produced no evidence to establish that lieutenants used independent judgment in directing the security officers or disciplining security officers; 2) produced disciplinary forms that involved attendance or work performance infractions for which there were enumerated regulations that mandated the type of discipline to be issued; and 3) failed to call lieutenant witnesses to testify about the role they played in the issuance of disciplinary forms. (Id. at 853).⁵ *Wackenhut Corp.*, 345 NLRB at 853-855.

⁵ The Board also determined that, "the Respondent eliminated the sergeant positions and transferred the sergeants' job duties to the nonunit lieutenants without securing the consent of the Union or seeking the approval of the Board" (Id. at 853) and the Respondent eliminated the CAS/SAS operators from the bargaining unit and reclassified them as nonunit lieutenants (Id. at 853).

Aside from extracting a “brief” review of “a somewhat detailed history of labor relations between the Union and Company,” the ALJ failed to consider the rest of the Board’s previous analysis in *Wackenhut* involving the same supervisory issue over individuals performing the same work, and erroneously reached a different conclusion about the lieutenants’ duties with regard to discipline than that previously reached by the Board. (ALJD 3:43-44).

Respondent continues to rely on documentation which lacks sufficient probative value. Lieutenants’ job duties with regard to the issuance of discipline have remained unchanged. The ALJ acknowledged that the lieutenant position existed before Frazier and Mack applied and were promoted to lieutenants in the fall of 2003. (ALJD 5:37-38). The ALJ does not make any distinction between the duties of lieutenants with respect to discipline addressed in the prior case and their duties in this case because no such distinction was established.

Respondent again failed to call any lieutenant to testify about changes to their duties regarding the issuance of discipline.

It is the duty of the ALJ to apply legally sound Board precedent which has not been reversed by the U.S. Supreme Court. *Los Angeles New Hospital*, 244 NLRB 960, 962 at fn. 4 (1979). *enfd.* 640 F.2d 1017 (9th Cir. 1981); *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), *enfd.* in part 331 F.2d 176 (8th Cir. 1964). In order to ensure a uniform and orderly administration of the NLRA, the reasoning applied by the Board in the previous *Wackenhut* decision should be applied in this case because there are no material factual differences. The ALJ’s failure to limit his review to new duties performed by lieutenants since the

litigation in the previous *Wackenhut* decision for the purpose of determining supervisory status under the Act, is a basis to set aside his decision on those relitigated issues.

Notably, the disciplinary documents in evidence do not materially differ from those considered in the prior decision which the Board deemed to be insufficient to establish supervisory authority. Here, Respondent introduced disciplinary forms that identified specific enumerated regulations and which mandated the type of discipline to issue. Unlike the evidence received in the previous case, Respondent's progressive discipline and attendance policies were admitted into evidence in the instant case, and they specifically mandate the type of discipline for every scenario. (GCX 17 and 18). In *Wackenhut*, the Board ruled that evidence of discipline which consistently cites specific, enumerated regulations that mandate the type of discipline to be issued, does not demonstrate that lieutenants truly exercise independent judgment within the meaning of Section 2(11) of the Act. *Id.* at 854, citing *International Transportation Service*, 344 NLRB 279 (2005) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001)).

Inexplicably, the ALJ failed to find that the disciplinary forms produced here describe offenses and discipline much like those produced in the prior case. 345 NLRB at 854, 866-867. Respondent relies solely on the following eight (8) Disciplinary/Corrective Action Notices issued to security officers (RX 16) in support of its contention that lieutenants are statutory supervisors with authority to discipline security officers: 1) Crystal Smith was issued a one-day suspension

and written discipline dated October 28, 2009 in accordance with Section 4.8 of Attendance Policy 107 for arriving late to work for the third time in a twelve month period;⁶ 2) Carlos Rojas was issued a one-day suspension and written discipline dated May 21, 2007 pursuant to Section 4.18 of Attendance Policy 107 for failing to report to work and to notify an administrator of his whereabouts; 3) Amaldo Donedo was issued a written discipline dated August 10, 2008 in accordance with Progressive Discipline Policy 108 because he caused damage to the security vehicle he was driving by striking the lift gate on the back of a parked vehicle; 4) Amaldo Donedo was issued a written discipline dated April 26, 2007 in accordance with Attendance Policy 107 for arriving late to work for the second time in a twelve month period; 5) Amaldo Donedo was issued an oral warning dated December 18, 2006 in accordance with Progressive Discipline Policy 108 for failing to report to training on time; 6) Crystal Smith was issued an oral warning dated April 9, 2008 in accordance with Attendance Policy 107 for failing to report to training on time; 7) Ruben Rodriguez was issued an oral warning dated June 21, 2007, in accordance with Attendance Policy 107 for arriving to work late; and 8) Alancia Singh was issued an oral warning dated January 25, 2007 in accordance with Attendance Policy 107 for arriving to work late. (RX 16). Thus, six of these eight disciplines involve the discipline mandated by Respondent's attendance policy (RX 18), and a seventh, the oral warning to Amaldo Donedo in December 2006, cites the progressive discipline policy but it

⁶ Lieutenant Crystal Smith was disciplined in this manner because it was her third tardy infraction in a twelve month period and the table in Section 4.8 of the Attendance Policy 107 provides for "suspension and written disciplinary" under these circumstances. (GCX 18 at page 9). Like all the disciplines citing to the Attendance Policy, this one is consistent with the mandated discipline and there was no exercise of judgment or discretion in selecting the penalty.

was, in fact, considered an attendance/tardiness violation also, as it warned Donedo that he would receive a written warning if another tardy occurred within the next 12 months. (See GCX 18, Attendance Policy 107, Section 4.8 at page 9). The eighth discipline, involving an accident with a security vehicle that was caused by the security officer, is specifically covered by the progressive discipline policy, and a written warning for such an infraction was mandated by that policy.⁷

In summary, Respondent's progressive discipline and attendance policies mandate the type of discipline and penalty to be imposed for each infraction depending on the nature of the infraction and the number of occurrences within the specified period. In the absence of any testimony by the lieutenants who issued those disciplines, or probative evidence from other witnesses as to these disciplines, there is insufficient evidence to establish that the lieutenants who signed the disciplines exercised independent judgment, as is required to establish supervisory authority within the meaning of Section 2(11) of the Act. See *Wackenhut*, 345 NLRB 854 (2005) and cases cited therein.

The ALJ also failed to consider documentary evidence which shows that while lieutenants participate to a degree in the issuance of discipline, that "involvement" is significantly limited and controlled by both Respondent's policies and review by Security Shift Supervisors or Captains. General Counsel's Exhibit 9, a One on One form for Thomas Frazier, prepared by Frazier's supervisor, includes the following comment: "Have more involvement with the Security

⁷ There are two bases in the progressive discipline policy for a level II violation in this situation---careless or reckless driving (GCX 11 page 8) and failure to meet satisfactory job performance (GCX 11 page 9). A written counseling is required for a level II infraction. (GCX 11 page 10).

Officers when disciplinary actions need to be issued. Review and use WNS policy 108 for guidance when issuing any disciplinary actions and have the Captain review the disciplinary prior to giving it to the Officers.” (Emphasis added.)

As in *Wackenhut*, Respondent’s case rests almost completely on a paper record consisting of a few warning forms. The lieutenants and Security Shift Supervisors or Captains involved in the discipline situations were not called to testify and Respondent provided no other first-hand evidence concerning the incidents addressed in these documents.⁸

Cecil Mack addressed the issuance of discipline in his testimony as well, and testified that lieutenants were only required to deliver notice of discipline to security officers and were not involved in making the decision. Yet the ALJ did not explicitly make any finding with regard to Mack’s credibility on these points. (Tr. 296:21-297:2 Mack). Instead, the ALJ relied on general, conclusionary, and self-serving testimony from Project Manager Mareth who admitted that he had no personal knowledge about the issuance of many disciplinary forms introduced into evidence and provided no specific testimony about the circumstances for the issuance of others. (Tr. 407:5-18, 19-25; 408:1-10 Mareth). Consequently, the record here, as in *Wackenhut*, does not establish a supervisory role for the lieutenants in the issuance of discipline. As noted in *Wackenhut*, “Respondent established only that the submitted documents were signed by lieutenants.” (Id.

⁸ Oddly, the ALJ discredited Thomas Frazier even though there is documentation in the record (as noted above in GCX 9) which corroborates his testimony that he understood he could bring the offenses set forth in Level III of the Progressive Disciplinary Policy to the attention of the Captain, but was never told he had the authority to issue discipline.

at 854). None of the disciplinary forms were signed by Frazier or Mack, whose supervisory status is at issue here.

Additionally, the ALJ's reliance on the speculative testimony of Mareth to suggest that lieutenants have discretion when issuing discipline pursuant to Respondent's policies was in error, and the ALJ's conclusion that, "a lieutenant may decide not to issue formal discipline at all, or to choose which level of discipline an infraction [sic] will be placed..." is not supported by the record as a whole. (ALJD 14:38-39). Moreover, the ALJ's reliance on the general testimony of Mareth to conclude that, "lieutenants have the authority to issue discipline up to and including suspension without the necessity of consulting with or obtaining approval of their superiors" (ALJD 15:1-4) is contradicted by Respondent's own document (GCX 9), as well as Mack's testimony. The personnel documents received in evidence which describe discipline, including the "Supervisory Requirements" signed by Frazier and Mack, are insufficient to establish supervisory authority. *Training School at Vineyard*, 332 NLRB 1412 (2000). Thus, Respondent has failed to meet the burden for establishing supervisory status as required under extant Board law.

In view of the above, the Board's findings in *Wackenhut* should be reaffirmed, and the ALJ's findings and conclusions with regard to the exercise of independent judgment in issuing discipline should be reversed.

e) The Lieutenants Do Not Responsibly Direct or Assign Work Using Independent Judgment (Transfers from One Post to Another and Overseeing of Work) (Exceptions 13, 14, 16):

Contrary to the ALJ's conclusion, there is no credible evidence that Frazier and Mack had authority to responsibly direct security officers or assign work using independent judgment. The record reveals that the same system of management is in place that controls workers' duties and responsibilities as existed in 2003. Captains make the post assignments. (Tr. 198:21; 200:2-3 Frazier; Tr. 291:17 Mack). Lieutenants monitor security officers at their posts and on patrols to ensure that they are in compliance with post assignment sheets, General Purpose Logs, the Security Force Instructions (SFI's) and other operating procedures. (Tr. 199:13-24 Frazier; Tr. 294:11-20 Mack). Similar SFI's were received in evidence in the prior cases. (GCX 33). Pursuant to the SFI's, lieutenants perform routine and clerical type functions, including the completion of a detailed checklist of tasks on logs. (GCX 35 – Logs, Patrol Sheets and Records; GCX 36 – Shift Turnover Relief). In *A/style Apparel*, 351 NLRB 1287 (2007), the Board found that a shift leader did not possess the authority to assign work within the meaning of Section 2(11) under circumstances very similar to those present here. In *A/style Apparel*, the employer's general manager prepared a preprinted form entitled "Machine Assignment Form" which listed the machines that were to be used on a shift, much like the SFI's, logs, post assignments, patrol sheets, and records here. The shift leader in dispute used the form and his knowledge of employees' capabilities to assign an employee to work on a particular machine.

With regard to the duties and authority of lieutenants at the Turkey Point plant, the ALJ states that he relied, “to a great extent, on the testimony of Project Manager Mareth” and he discredited the testimony of Frazier where contradicted by the testimony of others or, called into question by documentation. (ALJD 12:8-12). The ALJ erred in failing to adopt the Board’s findings and conclusions in *Wackenhut* that there was insufficient evidence to demonstrate that lieutenants could responsibly direct the work of security officers. Mareth testified that lieutenants oversee the work of security officers. (Tr. 319: 22-320:4 Mareth).⁹ Mareth also testified about what “could” happen to “a lieutenant who does not do a good enough job of ensuring the quality of performance of the security officers under their command.” (Tr. 331:16-21 Mareth). Such speculative testimony does not establish that lieutenants are, in fact, held accountable for the poor performance of security officers under their command. The documents received as RX 18 do not establish that any repercussions have been taken against lieutenants because the **security officers** failed to perform their assigned tasks.¹⁰ The documents received in RX 18, including the reference to a warning issued to Lieutenant Concha in connection with the performance of drills, do not even establish in this regard “that things may happen,” as the ALJ intimated at trial. (Tr. 337:3). The Performance Objectives and Development Plan issued to Lieutenant Martinez establishes that drills are clearly a task performed by lieutenants and for which they are held accountable, not security officers. (RX

⁹ As already noted, the evidence does not establish that this “overseeing” was responsible direction using independent judgment within the meaning of the Act. Similar “overseeing” was discussed in the *Wackenhut* decision. 345 NLRB at 867.

¹⁰ In *Oakwood*, the Board draws a distinction between discipline of a purported supervisor for his failure to perform his own job versus discipline for the failure of others to perform their jobs.

18). There is also no evidence that the Respondent ever informed lieutenants that they would suffer any consequences, either positive or negative, as a result of the poor performance of security officers on their team. The Board has found that the lack of evidence establishing that a lead person is held accountable for his/her direction of other employees precludes a finding of responsible direction. *Alstyle Apparel*, supra; *Golden Crest Healthcare Center, Inc.*, 348 NLRB 727, 730-732 (2006).

The ALJ did not discredit Mack and therefore his testimony should stand. Mack and Frazier substantially corroborate each other's testimony regarding their job duties as lieutenants. Mack and Frazier testified with regard to their daily contact with security officers before and after the shift briefing and at other times during the work day, in the Response Center, the power block, and the OCA. (Tr. 167:21-25; 168:1-3 Frazier; Tr. 273:6-7 Mack. As noted above, the Shift Captains decide the post and patrol assignments as well as the rotation of officers and schedules. (Tr. 198:13; 200:2-3 Frazier; Tr. 291:15-22 Mack). The Operations Coordinator assists the Shift Captain in determining these shift rotations. (Tr. 291:24-25 Mack). A lieutenant may assign work to a security officer in connection with a particular patrol, but in those instances he adheres strictly to the SFI's (Tr. 293:15-17 Mack). Any modifications to the post assignments have to be authorized by the Shift Captain. (Tr. 292:3-10 Mack). Lieutenants verify that the officers are at their assigned post or patrol based on the information on the post assignment sheets, and that they are aware of their post assignment and understand the post instructions by signing the general

purpose log. (Tr. 199:6-9, 23-24; 200:15-22 Frazier; Tr. 294:11-20 Mack). Post assignment sheets distributed to the officers each morning show the specific posts and patrols for the day as well as the respective assignments. (Tr. 198:24-199:2 Frazier). (Tr. 247:18-248:5; 248:22-25 Lambert). Lieutenants cannot change the general purpose log at the post. (Tr. 294:8 Mack). In addition to the guidance provided in the SFI's (Tr. 299:3 Mack; GCX 33), lieutenants rely on specific written procedures prepared by Respondent in performing their duties: "Conduct of Security-Logs Patrol Sheets and Records" (Tr. 299:7 Mack; GCX 35), "Conduct of Security-Shift Turnover and Relief" (Tr. 299:10; GCX 36), and "Security Operations Standard Practices" (Tr. 299:14 Mack; GCX 37). Shift Captain Quentin Ferrer and Operations Coordinator Juan Rodriguez did not contradict this testimony.

With respect to transfer of work posts, while there is some evidence that security officers have indicated a preference for a particular post assignment on Frazier's team, and Frazier would consider the request and generally would not confer with the Captain about the matter, such a basis for a transfer does not demonstrate the type of decision-making which confers statutory supervisory authority. Moreover, Mack testified that post assignments could not be traded without the Captain's approval. (Tr. 292:12-293:3 Mack). The record reveals that any work assignments by lieutenants in response to contingencies, events, or expressed preferences, are routine in nature, given that they do not have any express work assignment authority. *Spector Freight System, Inc.*, 216 NLRB 551 (1975). It is Respondent's burden to prove that lieutenants exercised

independent judgment under Section 2(11) of the Act. The Act construes supervisory status narrowly “because the employee who is deemed a supervisor is denied the rights which the Act is intended to protect.” *Chevron Shipping Co.*, 317 NLRB 379, 380-381 (1995). Therefore, the ALJ erred in failing to rely on Mack’s testimony and by concluding that lieutenants exercised independent judgment in the transfer or trading of work assignments.

In *Wackenhut*, the Board upheld the administrative law judge’s finding’s that the job duties of former bargaining-unit CAS/SAS operators and sergeants were transferred to the nonunit lieutenants and further determined that there was no evidence that the nonunit lieutenants exercised alleged supervisory authority in the performance of those job duties. (Id. at 852). The record evidence reveals that there has been no change in the lieutenant job duties since the prior Board decision that supports a finding that lieutenants are supervisors within the meaning of Section 2(11) of the Act. Lieutenants continue to issue weapons to security officers, observe security officers clean their weapons, and determine that security officers are fit for duty. It is apparent that the ALJ erroneously based his decision on documents lacking in probative value and the general, conclusionary and self-serving testimony of Project Manager Mareth. In reference to the “Supervisory Requirements” form (RX 1), the ALJ states, “Newly selected lieutenants, including Frazier and Mack, signed various documents after becoming lieutenants they had not been required to sign as security officers.” (ALJD 6:7-9). The ALJ also references other documents signed by Frazier and Mack including “Leadership Pledge” agreements, and “Management Challenge”

forms. (ALJD 6:18; RX 2, RX 3) The ALJ erred in basing his conclusions on various personnel documents signed by Frazier and Mack. Specifically, the "Leadership Pledge" agreement (RX 2) in which both Frazier and Mack identified their position as that of a "Supervisor" and other documents (RX 1, RX 2, RX 3, RX 7, RX 8, RX 9, and RX 13) that purportedly reflect supervisory authority are meaningless for purposes of proving responsible direction and accountability. Such evidence is not a substitute for direct testimony from individuals whose positions are at issue as "[t]he Board insists on evidence supporting a finding of actual as opposed to mere paper authority." *Training School at Vineland*, 332 NLRB 1412, 1416 (2000). At its core, the issue is not whether the lieutenants were portrayed to security officers as supervisors by Respondent. The issue is simply whether lieutenants, in fact, possess or exercise supervisory authority as defined in the Act. Here they do not.

Based on the above, Respondent has not met its burden to establish that the lieutenants possess the authority to responsibly direct or assign security officers using independent judgment, the Board's prior decision should be affirmed, and the ALJ's findings and conclusion should be reversed.

f) Secondary Indicia Alone Cannot Establish Supervisory Status (Exception 15):

The ALJ erred in relying on secondary indicia to conclude that lieutenants are supervisors within the meaning of Section 2(11) of the Act. Evidence with regard to pay, benefits, training, attendance at management meetings, and how management views lieutenants are not dispositive of supervisory status. *Training School at Vineland*, 332 NLRB 1412, 1412-1413 fn. 3 (2000); *Chrome Deposit*

Corps., 323 NLRB 961, 963 fn. 9 (1997). It is a workplace norm for an employer to have various job classifications with different powers, responsibilities, and pay, but proof of a higher job classification or pay rate is insufficient to establish supervisory status. *C.P.P. Security Services*, 259 NLRB 315, 315-316 (1981). While the evidence does establish that lieutenants were regarded as key employees, participated in certain management meetings at the local level, and received certain benefits only available to management, none of these factors, nor other secondary indicia of supervisory authority override the weight of the evidence in this record which indicates that at all material times herein, Thomas Frazier and Cecil Mack occupied a position devoid of the authority enumerated in Section 2(11) of the Act. At best, their responsibility to train and direct the work of others was an adjunct of their familiarity with the SFI's with which they worked. In fact, the Conduct of Security - Security Operations Standard Practices clearly demonstrate that all members of Respondent's security guard force have overlapping responsibilities which blur the separation of authority. (GCX 37).

For the reasons stated above, Respondent has failed to meet its burden of establishing that Frazier or Mack was its supervisor within the meaning of Section 2(11) of the Act, the ALJ's conclusion that they are supervisors should be reversed, and a determination should be made that they are employees within the meaning of Section 2(3) of the Act.

2. Respondent unlawfully suspended and discharged Thomas Frazier and Cecil Mack because of their protected concerted activity and to discourage other employees from engaging in these or other concerted activities as alleged in paragraphs 5, 6, 7, and 8 of the Complaint. (Exceptions 17 and 18)

The ALJ failed to decide the merits of these cases which allege the unlawful suspensions and discharges of Thomas Frazier and Cecil Mack. To the extent that the Board agrees with the Acting General Counsel that the lieutenants, including Frazier and Mack, are employees protected by the Act, the record evidence, summarized below, also supports a finding that Respondent unlawfully suspended and discharged Frazier and Mack because of their protected concerted activity and to discourage other employees from engaging in these or other concerted activities.

a) Events Leading to the Suspension and Discharge of Thomas Frazier (Exception 17):

Frazier raised working condition issues during the daily shift briefings throughout his entire employment. (Tr. 168:6-10 Frazier). Some of the security officers who requested that he speak to management about the concerns they raised with him included Messrs. Reigada, Lambert, Stanford, Santiago, and Morgan. Often concerns were vented while Frazier was in the Response Center with other officers. (Tr. 168:22-25 Frazier).

During the daily shift briefings the shift captain addressed the security officers and lieutenants and disseminated pertinent information for the day concerning the status of the units, fence zones or door that might be out of service, and additional posts established or that might have to be established. Occasionally, FPL representatives were present. (Tr. 163:9, 17-24; 164:1-8

Frazier). Toward the end of the daily briefing, when the shift captain opened the floor for questions and comments, Frazier and Cecil Mack often asked questions or made comments on behalf of the security officers or themselves. (Tr. 164:23-165:2, 5-6, 10-11 Frazier). This testimony is not contradicted. Frazier testified that about three to four times a month he would raise concerns about Respondent's requirements that officers wear hot and bulky load bearing vests (which caused some officers to experience back pain) and that officers wear cumbersome gas masks. These items created a potential safety hazard as they would occasionally get caught on protruding steam pipes as officers walked through the very hot power block area of the plant. (Tr. 165:20-25, 165:1-15 Frazier). Frazier also raised concerns with the captain about inadequate bathroom facilities and the lack of cleaning supplies resulting from a failure to reorder them on a regular basis. (Tr. 166:18-22; 167:4 Frazier). He raised operational issues including the use of 15-minute patrols instead of continuous patrols, work trading, and potential American with Disabilities Act compliance issues regarding the height of the labor area gates, and cable locks not readily accessible to people of a certain height or in a wheelchair. (Tr. 166:17, 23-25; 183:1-24; 167:1-3 Frazier). Frazier complained about a corrective action imposed on all guards to wear lanyards on their weapons because a single officer left his weapon in the bathroom unattended, thus creating another potential hazard. (Tr. 167:5-11; 182:3-21 Frazier).

In addition to raising these concerns during the daily shift briefings, Frazier raised them in electronic mail messages (Tr. 177:15-18 Frazier; GCX 27), in the

condition reporting process (Tr. 176:13-22; 177:16-24 Frazier; GCX 28), and in calls or face-to-face talks with Captain Quentin Ferrer, his immediate supervisor, and members of higher management. (Tr. 180:22-181:25 Frazier). Frazier testified that he often approached Respondent's supervisors and managers with these concerns, including Operations Coordinator Juan Rodriguez, and Leadership Development Manager Karen Bower MacDonald. (Tr. 173:15-23 Frazier).

About nine months before Respondent discharged Frazier (i.e., in about May 2009), he and other officers were required to attend a training class given by MacDonald. Before she solicited feedback, the officers, including Frazier, spoke amongst themselves about the presentation. Frazier stated that they collectively felt that MacDonald presented the training material in a very unprofessional manner by speaking to them as if they were a bunch of preschoolers instead of adults. When MacDonald solicited a critique from the officers, Frazier requested that in the future she present the material in a more mature and professional manner because everyone, speaking for all or most of the officers who were present, felt that she was aloof and presented the material as though they were kindergartners or elementary school children. (Tr. 179:1-24 Frazier). In subsequent training classes, MacDonald asked Frazier if she was presenting the material in a more professional, mature manner. (Tr. 180:8-10 Frazier).

On another occasion, about six months prior to Frazier's discharge, he learned from the security officers that they were dissatisfied with the chairs in the Response Center. Frazier went to Captain Ferrer to request new chairs but was

told that new chairs would not be provided anytime soon. (Tr. 170:6-14 Frazier). Frazier then approached MacDonald about the chairs and told her that many officers in the plant were complaining about them. She pointed to the corner and said: "You see that chair over there?" When Frazier acknowledged the chair in the corner, MacDonald stated: "...last week I sat in that chair for a whole eight-hour shift, and I just absolutely love that chair." (Tr. 170:24-171:1 Frazier). Frazier said that he respectfully replied: "I think you're the only one in the plant that loves that chair.... Do you think we can get some new chairs?" MacDonald replied: "we're going to keep these for a while and we'll consider getting different chairs when we need to reorder them." (Tr. 171:3-9 Frazier).

Union President Lambert confirmed that he frequently spoke to Frazier and Mack about workplace issues since 2003 because they were pro-union and they listened. They raised concerns about the ballistic vests, safety, and procedural changes. (Tr. 252:18, 253:15; 254:3-4 Lambert). Lambert was present at morning briefings when Frazier and Mack raised the issues that were discussed among the officers, such as safety, relief for security officers, rotations, and equipment issues. (Tr. 255:1-7 Lambert; GCX 28).

In February 2010, Respondent began a leadership effectiveness review of lieutenants at Turkey Point. (Tr. 41:11-14 Mareth). This process entailed the review of the 360 Tool submitted by security officers, and a management development questionnaire completed by the lieutenants. (Tr. 42:1-7 Mareth). Security officers completed and submitted the 360 Tool in February 2010, and managers completed the Performance Assessment Network Management

Development Questionnaires (Questionnaires) in 2009. (Tr. 41:22-25; 42:8-10 Mareth; GCX 5 – Questionnaire for Frazier; GCX 6 – 360 Tools for Frazier). The strengths or qualities noted by security officers on the 360 Tools for Frazier included: listener; knowledge; patience; sympathy; honesty; trustworthiness; communication; and professional. (GCX 6). The 360 Tool was used as part of the promotions process for lieutenants and to provide feedback to Respondent from the security officers. (Tr. 148:1-3, 12 MacDonald). According to MacDonald, these were the sole instruments used to assess the performance of lieutenants.

According to Respondent, based on the information gathered from his Questionnaire and the 360 Tool, Respondent determined that Thomas Frazier failed his leadership effectiveness review. (Tr. 45:10-14; 20-21 Mareth; GCX 7). Leadership Development Manager Karen MacDonald compiled the information for the Leadership Effectiveness Review and Project Manager Mike Mareth made the recommendation that Frazier be discharged based on the information from the 360 Tools and his Questionnaire. (Tr. 46:1-11; 47:3-11 Mareth). At no time did anyone in management discuss the results of the leadership effectiveness review with Frazier. (Tr. 196:25-197:3 Frazier). The final decision to discharge Frazier was made by Ray Cogdell, Vice President. Mareth testified that Frazier was fired because he failed the leadership effectiveness review. (Tr. 48:17-19 Mareth). Although Frazier received a positive annual evaluation and positive One on One quarterly reviews in 2009 from Shift Captain Quentin Ferrer, his

immediate supervisor, these performance reviews were not taken into consideration. (Tr. 50:10-15 Mareth; GCX 8 and GCX 10).

On February 12, 2010, Frazier discovered that his badge had been placed on hold and his access to the plant was suspended. (Tr. 185:4-5, 13-15 Frazier). Mareth instructed Frazier not to work on Saturday or Sunday and to meet him on Monday, February 15, at 10 a.m. At the meeting on February 15, Mareth asked Frazier if he had any knowledge about anyone using the company computers for anything other than company business. Frazier replied that he had and described people who watched YouTube videos, checked their bank accounts, and ordered items from a security police supply company. Mareth asked who authorized it and Frazier replied that he did not think it was authorized and everybody does it. Mareth asked Frazier if he used the computer and Frazier said he used it for the same kinds of things. (Tr. 188:22-189:9 Frazier).

Mareth also asked Frazier if he had any nuclear concerns that had not been raised, safety related issues, Safety Conscious Work Environment (SCWE) issues, or harassment issues. Frazier said he did not have any new issues to address. (Tr. 189:10-16 Frazier). Mareth then stated: "as of today, ... management, the Leadership Development Manager Karen Bower (MacDonald), myself, and Juan Rodriguez feel that you do not effectively support management and that you would not effect change going forward." (Tr. 189:20-24 Frazier). Frazier asked him to repeat what he said, and he did. Mareth slid a piece of paper to Frazier as he stated it again. Frazier asked Mareth what he had to substantiate these allegations because Respondent has a progressive discipline

policy. Mareth replied that he heard that Frazier had threatened to get an attorney and if he got one, he would provide the information. Mareth replied that if he gets an attorney, they will or might provide it later. Mareth instructed Frazier to arrange for the exit interview process with Rodriguez. (Tr. 190:1-20 Frazier). Frazier stated that even though he sometimes disagreed with the policies and procedures, he always followed them, and that he was a voice for the security officers and the other lieutenants and it was not right for him to be terminated. (Tr. 190:23-191:4 Frazier). The meeting lasted 20 minutes and Frazier was never told the reason for his discharge. (Tr. 191:8-11, 17-19; 192:1 Frazier).

Frazier returned on February 23, to meet with Rodriguez for the exit interview and the whole body count. At that time, Rodriguez gave him an Employee Disciplinary Corrective Action Notice which stated that the reason for discharge was: "Failure to meet satisfactory Leadership expectations." (Tr. 192:21-193:13; 194:4-5 Frazier; GCX 19). This was not the same document presented during the February 15 meeting. (Tr. 194:20-23 Frazier).

Respondent prepared a Leadership Effectiveness Review for Frazier dated February 8, based on his Management Development Questionnaire dated 5/15/2009, and the Competency-Based 360 Feedback Tools dated 2/4/2010. The comments which support the low score for supervisor effectiveness that Frazier received are as follows:

... He demonstrates unwillingness to accept, adapt, and contribute to change. **Tom lacks an innovative attitude and openly criticizes management decisions at team briefings. Instead of assisting his team members to accept change, Tom often fuels the flames with his own opinion.** Often, Tom identifies problems, places blame, and does little to actively solve an issue with sound

analysis and solutions. He often applies this ineffective pattern which compounds problems rather than developing new and successful outcomes. He doesn't see himself as part of management, and therefore is not leading us into the future.

(GCX 7 at page 1, misspellings in original, emphasis added).

b) The Events Leading to the Suspension and Discharge of Cecil Mack (Exception 18):

At shift briefings, Mack raised issues with the captain which he had discussed with security officers, such as officers being posted in the sun for six hours without shelter, inadequate water, hot vests, favoritism on the shift, strict attendance policy, and unfair treatment. (Tr. 275:1-12 Mack). Mack identified several security officers who brought these issues to his attention including Union President Timothy Lambert, who raised issues concerning vests and the attendance policy. (Tr. 275:20-21; 276:2-3 Mack). Mack raised issues during the briefings from the time he was appointed to be a lieutenant until his discharge. (Tr. 276:16-19 Mack).

On January 25, 2010 at about 6:30 a.m., Mack was in the central alarm station when he received a distress call from Anthony McKay, Final Access Control officer. McKay reported that Florida Power & Light security representative, Bret Rittmer, was introducing items into a scan ray machine that was placed out of service. Mack said that per department procedures, only Security and Instrument and Calibrations employees were permitted to test or troubleshoot equipment. (Tr. 277:24-278:4, 10 Mack). Mack pulled Rittmer to the side and explained that his actions were causing a cluster of personnel who were locked out of the plant. (Tr. 279:5-13 Mack). He also told Rittmer he was

not authorized to troubleshoot equipment deemed out of service and if he had notified shift supervision, the lieutenants, or the Final Access Control office, they could have avoided the cluster that he caused at the turnstiles with employees being locked out of the plant. (Tr. 279:22-280:3 Mack). Mack testified that his voice level was a little more than a whisper and he was calm because the hallway was packed with plant employees. (Tr. 280:18-24 Mack). Mack further testified that he did not use any profanity in this conversation with Rittmer about Lane 3. (Tr. 280:25-281:2 Mack). Mack recalled that security officers Ed Daniels, Nikki Napier, Antoine Geffraud, and Tameka Ferguson were close enough to overhear his conversation with Rittmer. (Tr. 281:3-10 Mack). Mack and Rittmer went inside the Final Access Control office to continue the discussion where Anthony McKay and security officer Johnnie Davis were also present. (Tr. 281:14-17 Mack). Mack said that he and Rittmer were joking about the situation and Rittmer thought it was a big misunderstanding. (Tr. 281:19-21 Mack).

Three days later, Operations Coordinator Juan Rodriguez called Mack into Captain Ferrer's office and with Ferrer present, asked him if he used the phrase "cluster fuck" in front of Rittmer. Mack said no. Mack was asked to write a statement of the incident which he did later the same day, and delivered it to Rodriguez and Ferrer. Ferrer read the statement, tore it up, and said, "okay, it sounds good." (Tr. 282:16-18, 24-283:8 Mack; GCX 34).

On Sunday, January 31, 2010, Mack received a call from Ferrer, telling him to report for work, rather than training the following day. On Monday,

February 1, 2010, Mack got another call from Ferrer, saying that Mack was not to report to the shift or training, and that he was being suspended for the "bullshit incident that happened in the hallway" and that Mareth would call him the next day. (Tr. 284:8-16 Mack). Mareth did not call, so on Wednesday (February 3), Mack called Mareth who told Mack that he was suspended for foul language in front of Florida Power & Light security pending investigation. (Tr. 284:20-285:2 Mack). Later in February, Mareth called Mack and requested a meeting on February 22, at 12 noon. Mack requested that Rittmer be present as well. (Tr. 285:12-25 Mack). Mack began the meeting by asking Rittmer why he waited a couple of days later to bring up the issue of his alleged use of foul language or acting in an unprofessional manner. Rittmer stated he had his vacation on his mind at the time and then left the meeting. (Tr. 286:9-15; 287:3 Mack). Mack asked Rodriguez why he did not speak up when he knew that Mack did not curse. Rodriguez told Mack that he did seem calm but he could not confirm if he did or did not curse because he was inside the Final Access Control office at the time. (Tr. 286:17-22 Mack). Mareth told Mack that the investigation was concluded and he was terminating Mack's employment. Mareth said he had a witness saying that Mack used foul language. (Tr. 287:5-7 Mack). When Mack stated there were witnesses who said he did not use foul language, Mareth admitted that there were conflicting stories, but said he was terminating Mack's employment. (Tr. 287:9-11 Mack). Mareth gave Mack an Employee Disciplinary/Corrective Action Notice which states the following reason for discharge:

Cecil was involved in an incident with the client that involved undesired behavior. As part of the process management completed a review of Cecil's personnel file. As a result of the review it is managements perspective that Cecil's performance does not meet expectations for Supervision. You are being issued a Level 1 violation. Failure to meet satisfactory job performance or behavior standards.

(GCX 22).

There is no dispute that Mack was discharged as a result of Respondent's review of his personnel file and conclusion that his performance did not meet its expectations for supervision, as found in Mack's Leadership Effectiveness Review dated February 9, 2010. (Tr. 102:7-10 MacDonald). The strengths or qualities noted by security officers on the 360 Tools for Mack included: trust; communication; informing; very knowledgeable; and is on the security officers side. (GCX 12). The Leadership Effectiveness Review was based on his Performance Assessment Network Management Development Questionnaire dated July 10, 2009, combined with the Competency-Based 360 Feedback Tool dated February 4, 2010. (Tr. 47:4-11 Mareth). The comments on the Leadership Effectiveness Review which support the low score received by Mack are as follows:

He demonstrates unwillingness to accept, adapt, and contribute to change. **Cecil lacks an innovative attitude and openly criticizes management decisions at team briefings. Instead of assisting his team members to accept change, Cecil often fuels the flames with his own opinion....** Often, Cecil identifies problems, places blame, and does little to actively solve an issue with sound analysis and solutions. He often applies this ineffective pattern which compounds problems rather than developing new and succssful outcomes. He doesn't see himself as part of management, and as viewed by one direct report, **'is on the security officer's side.'** Cecil finds it difficult to demonstrate a balanced view.

(GCX 13 at page 1, misspellings in original, emphasis added; see GCX 12, 2nd page regarding the direct report's comment that Mack is on the security officers' side). Mack's Leadership Effectiveness Review explained the gap between his high leadership score on his Competency-Based 360 Tool and his low score on his Management Development Questionnaire as follows:

This gap is caused by the above-mentioned over alignment with security officer concerns and too little attention to the remainder of his duties [sic] (customer focus and lack of support for management decisions). ... There are no scores in the above-average range. This indicates a leader who is more "a team member" than a team leader.

(GCX 13 at page 1, misspelling in original, emphasis added).

Mack was never told about the leadership effectiveness program or the results from it, and he was unaware that he was being reviewed. (Tr. 106:23-25 MacDonald; 289:4-13 Mack; GCX 13). He had never seen or discussed the management development questionnaire. (Tr. 291:10-12 Mack).

c) Employees Frazier and Mack were Discharged Because of Their Protected Concerted Activities (Exceptions 17 and 18):

Individual employees who bring group complaints about workplace issues to the attention of management are engaged in concerted activities that are protected by Section 7 of the Act. *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986). Respondent does not dispute that Thomas Frazier, who worked for Respondent for 21 years, complained about working conditions and spoke up for others. Respondent's evaluation of Frazier states that, "Tom identifies problems [and] places blame."

The working conditions about which Frazier complained to management on behalf of security officers included requirements that the security officers wear bulky load bearing vests, cumbersome gas masks, and lanyards, all of which Frazier cited as safety hazards. Frazier also raised security officer concerns about inadequate bathroom facilities, the lack of cleaning supplies, continuous patrols, work trading, and American with Disabilities Act compliance issues regarding the height of the labor area gates. Such complaints are both concerted and protected by Section 7 of the Act. *Phillips Petroleum Company*, 338 NLRB 916 (2003).

Frazier's complaints to management about a number of working conditions were the outgrowth of his earlier discussions with Union President Lambert and other employees about working conditions, and therefore constituted concerted and protected activity. *Every Woman's Place*, 282 NLRB 413 (1986), and cases cited therein; see also *Midland Hilton & Towers*, 324 NLRB 1141 (1997); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), after remand 310 NLRB 831 (1993), enf'd. 53 F.3d 261 (9th Cir. 1995). Moreover, as Respondent acknowledged in the Leadership Effectiveness Review, Frazier's complaints to management were frequently made at the shift briefings in the presence of other employees. Frazier's complaints about health and safety concerns and other working conditions of the security officers therefore constituted concerted and protected activity. *Talsol Corporation*, 317 NLRB 290, 317 (1995). In this regard, Respondent admits that the Safety Conscious Work Environment and Employee Satisfaction Process may entail

circumstances where employees who bring issues forward are engaged in "Protected Activity". (RX 19 at page 2).

Respondent's knowledge of and animus towards Frazier's protected concerted activities is referenced in its Leadership Effectiveness Review of Frazier, which states that Frazier openly criticized management at team briefings, and instead of assisting his team members to accept change, he often fueled the flames with his own opinion. It is evident that Respondent was upset with Frazier because he complained about working conditions in the presence of co-workers on his team and because he attempted to influence co-workers by stating his opinions about working conditions in group meetings. There is no real issue with respect to the conduct for which Frazier was suspended and discharged. Based upon the comments in Frazier's Leadership Effectiveness Review, it is evident that Frazier's protected concerted activity was the reason Respondent was motivated to suspend and discharge him.

Respondent argues that Frazier and others were regularly encouraged to report workplace issues and comments on working conditions through the Safety Conscious Work Environment program and the Corrective Action Plan, so it could not have been motivated to discharge Frazier based on his Section 7 activities. However, Respondent's interest in encouraging such reports was apparently to satisfy Florida Power & Light's security requirements, rather than the result of concern about the welfare of its employees, as is evident from its responses to Frazier's and Mack's complaints. Moreover, although Respondent may have tolerated reports concerning working conditions to a degree, and may

have even included some of these items on a list of things it intended to address, the employees' concerns were not in fact addressed. Frazier was persistent, and Respondent refused to tolerate such complaints from its lieutenants. Thus, Frazier received a coaching when he raised equipment issues that the lieutenants and security officers shared directly with management. (GCX 27). Accordingly, it is apparent that Respondent violated Section 8(a)(1) of the Act by suspending and discharging Frazier because of his protected concerted activities on behalf of security officers.

As with Frazier, Respondent does not dispute the evidence that Cecil Mack, a nine year employee, spoke up for other employees concerning their working conditions. Like Frazier, Mack relayed concerns about working conditions that security officers had discussed with him to management, and did so at meetings conducted by management and in the presence of other employees. Mack reported to management concerning security officers being posted in the sun for six hours without shelter, having inadequate water, hot vests, favoritism on the shift, the strict attendance policy, and unfair treatment. Such complaints are both protected and concerted. *Phillips Petroleum Company*, 338 NLRB 916 (2003).

Mack's Leadership Effectiveness Review, dated February 9, 2010, parrots the Leadership Effectiveness Review of Frazier and references Mack's protected concerted activities by criticizing him for siding with the security officers at meetings.

Although Respondent asserts that it suspended Mack on or about February 2, 2010, because of his alleged use of the phrase "cluster fuck" in talking to Brett Rittmer of Florida Power & Light, there is no credible evidence that Mack used profanity or behaved unprofessionally on January 25, 2010. Captain Ferrer did not refute Mack's testimony concerning his conduct on January 25, or concerning Ferrer's satisfaction with Mack's written statement about the incident. Respondent failed to call Rittmer, Florida Power and Light representatives Charles Sengenberger or Ted Ostenson, or any other individuals who may have been present during the alleged incident on January 25, 2010, and the hearsay statements of the FP&L representatives (RX 34) should not be credited. Thus, the evidence shows that the real reason Respondent suspended and discharged Mack is the same reason it suspended and then discharged Frazier, because he engaged in protected concerted activities on behalf of the security officers.

Respondent failed to establish that it would have suspended or discharged Mack notwithstanding his protected concerted activities. The alleged misconduct on January 25, 2010, constitutes a Level III discipline under the Progressive Discipline Policy. (GCX 17 at page 9). Mack had never been disciplined for the use of abusive or offensive language in the presence of fellow officers or others in the past. (Tr. 288:22, 23-25 Mack). The undisputed evidence shows that Mack properly intervened with Rittmer, who had caused the problem, and that Respondent failed to follow its progressive disciplinary policy, which in cases of abusive language, begins with an oral counseling. (GCX 17 at page 3).

Respondent's contention that it suspended and discharged Mack for abusive language is especially suspect because Mack exceeded expectations and achieved a rating of "3" with respect to focusing on the customer. In his evaluation of Mack for the period from January 1, 2009 to December 31, 2009, Captain Ferrer noted that Mack "Projects positive and 'can do' image" and "Communicates well, with courtesy and effectiveness." (GCX 14 at page 1).

Significantly, regardless of the determination regarding Mack's suspension, Respondent admits that it then conducted a review of Mack's entire file, and that the decision to discharge Mack was based on that review, which included Mack's Leadership Effectiveness Review dated February 9, 2010, between the dates Respondent suspended and discharged him. The timing of the Leadership Effectiveness Review, and Respondent's criticism of Mack therein for speaking at meetings on behalf of security officers, establishes a strong prima facie case that Mack's protected concerted activities motivated Respondent's decision to discharge him. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983).

Although Respondent suggests that the decision to suspend and discharge Mack was prompted by Florida Power & Light, there is no probative evidence to this effect. Mack credibly testified concerning Rittmer's complete lack of interest in the incident on January 25, 2010. Moreover, Mack insisted on Rittmer's presence at the discharge meeting. At the meeting, Rittmer implausibly explained that he did not immediately tell Mack about his alleged unprofessional

behavior because "he had his vacation on his mind." (Tr. 286:15 Mack). Rittmer was not called to rebut this testimony and Mareth, who was also present at this meeting, does not dispute that this occurred. Respondent has failed to meet its *Wright Line* rebuttal burden of showing that it would have suspended or discharged Mack even in the absence of his protected concerted activity.

D. Conclusion (Exceptions 1 through 21)

The Acting General Counsel respectfully urges the Administrative Law Judge to find and conclude that 1) Respondent failed to meet its burden of establishing that Frazier and Mack were supervisors within the meaning of the Act, 2) Frazier and Mack are employees within the meaning of Section 2(3) of the Act, and 3) Respondent violated Section 8(a)(1) of the Act by indefinitely suspending Mack on February 2, 2010, indefinitely suspending Frazier on February 12, 2010, and discharging Frazier and Mack on February 15, 2010, because they engaged in protected concerted activities and to discourage other employees from engaging in such activities.

The Acting General Counsel further requests that the Administrative Law Judge recommend that the Board order Respondent to: cease and desist from these and like or related unfair labor practices; offer Frazier and Mack immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent jobs, without loss of seniority or other rights and privileges they previously enjoyed; make Frazier and Mack whole, with daily compound interest, for any loss of earnings and benefits they may have suffered as a result of their suspensions and discharges; remove references to Frazier's

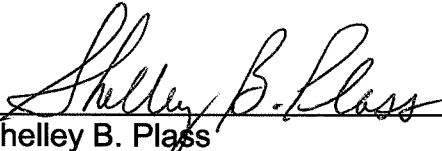
and Mack's suspensions and discharges from its files, notify them in writing that this has been done, and not use these actions against them in any way; post a Notice to Employees; and provide such other relief as the Board finds appropriate.

The Acting General Counsel also seeks a remedy requiring Respondent to reimburse Frazier and Mack for any excess federal income taxes they may owe upon receiving a lump-sum backpay award covering more than one year of backpay. The matter of reimbursement for excess taxes owed was pled in the Complaint and therefore fully litigated in this proceeding. *WEBCO Industries, Inc.*, 340 NLRB 10 (2003). Under current tax laws, discriminatees who receive lump-sum backpay covering a multi-year period are likely to incur federal income taxes at a higher rate than if they had received their wages in due course. Reimbursement for amounts equal to the difference in taxes owed on receipt of a lump-sum payment and the taxes owed if there had been no discrimination, is an appropriate component of a make whole remedy.

Finally, the Acting General Counsel seeks a requirement that Respondent notify the Social Security Administration of the appropriate periods to which the backpay should be allocated. Employers are required to report backpay to the Social Security Administration which, in turn, gives credit to the discriminatee's earnings record for the periods the wages should have or would have been paid by the employer. Consequently, if Frazier and Mack receive lump sum backpay for multiple years in a single year, this may result in a lower social security benefit or a failure to meet the requirements for benefits. To put the

discriminatees in the same situation they would have been in had it not been for the discrimination against them, Respondent should be required to notify the Social Security Administration as to the appropriate periods to allocate backpay in accordance with instructions for filing a special report set forth in the Internal Revenue Service Publication 957 - Reporting Back Pay and Special Wage Payments to the Social Security Administration.

DATED at Miami, Florida this 24th day of August, 2011.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of Acting General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision and Recommended Order in the matter of G4S Regulated Security Solutions, A Division of G4S Secure Solutions (USA) Inc., f/k/a The Wackenhut Corporation, Cases 12-CA-26644 and 12-CA-26811 was served electronically upon the following individuals on this 24th day of August, 2011.

By electronic filing:

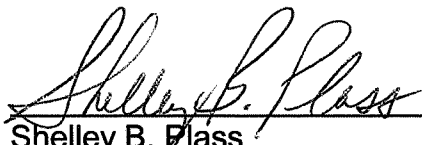
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